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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

NO. 3 BULL TOWING COMPANY, THE BULL DURHAM & BARGE, NBC 965,
Petitioners,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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OPINIONS.

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 22a-36a. The opinion of the Court of Appeals is reported at 326 F. (2) 18.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 18, 1963. The timely Petition of No. 3 Bull Towing Company, The Bull Durham & Barge, NBC 965, etc. for a rehearing was denied on March 3, 1964, by the Court of Appeals for the Sixth Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Significant questions of admiralty law are presented in this suit to recover damages for contamination of petroleum products due to an alleged unseaworthy condition of a barge.

The following questions are presented:

(1) Whether a shipper, who loaded a barge through its agents, inspected the barge cargo compartments, valves and all barge appurtenances before and after loading, sealed all hatches and valves after loading, tested all valve wheels before loading and who was in charge of unloading its product from the barge, be allowed to recover damages for contamination of its products where the owner of the barge, as a private carrier, furnished to the shipper a barge which was reasonably fit for its intended use and where there was no actionable negligence on the part of the owner, the captain, officers and crew of the barge.

(2) Whether a vessel is unseaworthy as a matter of law where loss is caused not by the vessel, its appurtenances or its crew, but the isolated and completely unforeseeable introduction of a foreign agent from without.

(3) Whether the evidence of market value of gasoline may be established by the testimony of witness who did not know of his own knowledge of market value of gasoline at the point of delivery, but who was allowed to testify as to market value from a pricing schedule which was made by others who did not testify and which pricing schedule was used to recapitulate damages claimed for such contamination.

STATEMENT.

This is an action in admiralty for damages resulting from a contamination of premium or ethyl gasoline by kerosene. The cause of action is based upon the alleged unseaworthiness of the Barge NBC 966 and the fault and neglect of the No. 3 Bull Towing Company.

The Petitioner contends that the Barge NBC 966 was seaworthy and that it exercised ordinary care in the transportation of the cargo which is the subject of this suit.

Sometime prior to April, 1957, the Respondent, Monsanto Chemical Company, through its subsidiary, Lion Oil Company, entered into an oral contract with the Petitioner, No. 3 Bull Towing Company, whereby for an agreed consideration the No. 3 Bull Towing Company agreed to provide the entire capacity of the towboat Bull Durham and the Barges NBC 966 and 965 to said Respondent for the purpose of carrying and transporting Respondent's petroleum products from Helena, Arkansas, to the Respondent's terminal in Memphis, Tennessee (App. pp. 23a, 254a). The contractual agreement between the parties was discussed in February, 1957, between representatives of the Respondent and Mr. Edwin T. Bull, president of the No. 3 Bull Towing Company. The agreement for the transportation of the Respondent's products did not include either the loading of said petroleum products on said barges or the unloading of said products at Respondent's terminal (App. pp. 24a, 256a, 418a).

The Petitioner, No. 3 Bull Towing Company, and the barge NBC 966 had been transporting the Respondent's products for a number of years prior to April, 1957, and in particular during the month of April, 1957, Petitioner with its tow had made a trip to Memphis, Tennessee, from Helena, Arkansas, and again another trip from Helena, Arkansas, to Chicago, Illinois (App. 24a, 254a).

Upon completion of the unloading of the barges at the Respondent's terminal in Chicago, Illinois, the towboat Bull Durham and barges NBC 966 and 965 proceeded to the Helena Terminal of Project Five Pipeline Corporation and the same arrived on April 24, 1957, and loading of products on board the barges began on April 25, 1957 (App. pp. 257a, 281a).

Prior to the arrival of the towboat Bull Durham and barges NBC 966 and 965, at the Project Five Pipeline Corporation terminal at Helena, Arkansas, the captain of the towboat inspected their compartments and found them to be empty. Upon arrival at the Helena terminal, the shore personnel directed the captain of the towboat as to where to spot or place barges 966 and 965. (App. pp. 24a, 317a, 330a). After spotting same for loading, the captain and the crew remained aboard the towboat moving off some distance while the loading operations were performed on the barges. Prior to loading, the Project Five Pipeline Corporation again made an inspection of all cargo tanks and found them to be empty and in good condition to receive the various petroleum products. On this occasion, the captain of the tow herein followed the usual custom and practice established at this terminal by delivering the barges to the loading terminal for loading. None of the crew or officers of the towboat Bull Durham either supervised or controlled in any manner the loading of the barges and in particular Barge 966. The loading, including the supervision and control thereof, was done entirely by the employees of Project Five Pipeline Corporation, who were acting for and on behalf of Lion Oil Company in so doing (App. pp. 24a, 25a, 223a, 229a, 317a). The Respondent paid to the Project Five Pipeline Corporation as part of its tariff the transportation of the petroleum products from El Dorado, Arkansas, through pipeline to Helena, Arkansas, and the loading of products from

the terminal at Helena into the barges (App. pp. 23a, 25a, 65a).

Barge 966 is fitted with a pipe or cargo header line running longitudinally along its bottom and down its center. The barge has ten cargo tanks, five on each side thereof. The ten inch cargo header line is equipped with the necessary valves to service its separate cargo compartments and runs from the forward tanks to an eight inch athwart ship line used in discharging cargo. From the cargo header line aforesaid, individual feeder lines equipped with valves run to each compartment so that when loading or discharging products, the flow to or from each of the tanks or compartments can be controlled and so that by use of the valves the integrity of each of the compartments may be maintained (App. p. 25a).

For each compartment there is a valve located inside, near the bottom of the compartment with the stem of the valve running up above deck and through the expansion dome. There is a wheel on the expansion dome which controls the opening and closing of the valve itself. The valve wheel turns in a clockwise manner to close and opens in a counter-clockwise movement.

The valves of the 966 are of the Jenkins globe-type with internal threads, the movements and inner workings of which cannot be observed from the hatch opening located on the expansion dome. The only method for examining the movements and inner workings of these valves is by removing and dismantling them (App. pp. 25a, 242a).

Upon completion of the loading of the barges, inspection was made by Project Five personnel of all of the compartments of barge 966. The inspectors took samples from each compartment by lowering a bottle or can attached to a cord into each and taking a small quantity of the product therefrom. These samples were tested and

no mixture or contamination of gasoline with kerosene or kerosene with gasoline was detected. During and upon completion of loading, all valves on barge 966 were checked by Project Five personnel and found to be operating properly. Project Five employees then closed all of the valves and hatches, securing them with wire and lead seals. After the hatches and valves had been sealed the compartment valves could not be opened without a breaking of the seals. After loading, inspection, sampling and sealing of the barges had been completed, the dock superintendent of Project Five notified the captain of the Bull Durham that the barges were ready and the same were received by the Bull Durham for towing. The tow was thereupon moved to the Lion Terminal at Memphis for delivery (App. pp. 26a, 223a).

As the tow proceeded to Memphis, no checks were made of the valves on Barge 966, and it was not customary or proper to do so as the same had been sealed by the Pipeline Corporation of Helena when the loading was completed (App. pp. 26a, 230a, 318a).

At about 11:45 A. M. on the morning of April 26, 1957, the Petitioner's tow consisting of the Bull Durham and barges 966 and 965 arrived at the Memphis Lion Terminal dock with its cargo of petroleum products. Captain Cobb, of the Bull Durham, was in the pilot house of the vessel as the tow reached the Lion dock. Upon orders from the Lion terminal personnel, he directed the mooring of the barges at the dock. Barge 966 was placed alongside and adjacent to the dock and 965 alongside it with the bows of both barges headed down stream. Both barges were spotted opposite the pipelines on the dock aforesaid, which comes to the water's edge. Each of the pipelines is controlled by a gate valve and leads to the shoreline which runs the length of the dock and then turns inland under ground to the shore storage tanks (App. pp. 27a, 319a).

At about 12:10 P. M., Edgar Miles, the dock foreman for the Lion Oil Company, who is a certificated tankerman, and Robert Wages, the terminal operator for the Lion Oil Company, who is also a certificated tankerman, came aboard barge 966 to begin cargo discharge operations. It was their first responsibility to determine the contents of the barge and whether such was proper to be received into the shore tanks. They were assisted by one or more members of the crew of the Bull Durham in attaching a flexible rubber hose from the pipeline on the dock to the barge's discharge line which extends across the stern of the vessel (App. pp. 27a, 107a).

The Lion employees readied the dock facilities to receive the products. The Lion employees, including Miles and Wages, first broke the seals on the valves and hatches and gauged the compartments. Miles and Wages, further, as a part of their duties, examined all of the valves on the 966 and found them in good working order prior to the commencement of discharge of the products. Captain Cobb and Wylie Warren, the deckhand and tankerman on the towboat, also checked the valves on each compartment on barge 966 in company with the shore personnel. (App. pp. 27a, 28a, 114a, 115a, 164a, 166a).

It was determined by samples taken by the shore personnel prior to the unloading of any of the products from 966 that there was no mixture or contamination of gasoline into any of the other compartments, particularly the diesel compartments 3 and 4, port and starboard, and the kerosene tanks, No. 5 port and starboard (App. pp. 28a, 113a).

Wages opened the valves on Nos. 1 and 2 port and starboard tanks, containing the ethyl or high octane gasoline which was to be discharged first. The pump engine located near the stern of the barge was primed and started by Wylie Warren. Next, Miles and Wages checked the

hose connections and ascertained that the barge was ready to commence discharge of its products. At about 1:20 P. M. the shore gate valve was opened by Lion personnel, being the last step prior to commencement of actual delivery of the products from the barge to the shore tank and the discharge operations were under way.

The entire unloading operations were under the control, supervision, and direction of the Lion Oil Company and its personnel, including its certificated tankerman on duty at the time, and they gave the necessary orders to Wylie Warren, whose duty it was to tend the engine of the pumps on the 966, as to when to engage or disengage the said pumps (App. pp. 28a, 121a, 271a, 320a, 335a, 354a; 375a, 376a).

At about 3:00 P. M. on this date, April 26, 1957, the crewman Warren noticed a list to port of the barge 966 and notified the Lion dock tankerman who commenced an immediate investigation as to cause of the same (App. pp. 28a, 336a). It was discovered that the No. 5 starboard valve which controlled the No. 5 starboard tank containing kerosene was opened to some degree, permitting kerosene to be pumped into the main header line and into the shore tank simultaneously with the ethyl gasoline being pumped from the forward compartments. The investigation further revealed that the level of the kerosene was down some three feet in the starboard tank No. 5 which represented a discharge from that tank of approximately 14,000 gallons. This kerosene had been pumped out along with approximately one-half, or 125,000 gallons of ethyl gasoline aboard into the shore tank also containing ethyl gasoline. Warren disengaged the pump engine and the Lion foreman and superintendent, were notified of the trouble (App. pp. 29a, 275a, 322a, 327a).

At or about the time the pumping ceased, Mr. Ed Bull, president of the Petitioner's company, arrived at the Lion dock. Upon his arrival, two men, one of his crew

and one of the Lion personnel, were closing the No. 5 starboard valve by turning its wheel with the aid of a metal bar (App. pp. 29a, 272a, 273a). Bull stopped this attempt at closing the valve to prevent the possible breaking of the valve stem, then proceeded to ascertain the facts as to what had occurred. During the time he was investigating the matter at or about 4:00 or 4:30 P. M., Marion Warren, the regular mate of the tug Bull Durham arrived at the dock to resume his duties as a member of the crew, following a leave of absence therefrom. Marion Warren, upon being advised of the difficulty with the No. 5 starboard valve, immediately proceeded to turn the valve wheel thereon and was successful in turning it by a one-fourth to one-half turn completely closing it. The Lion Oil Company dock tankerman and dock employees were present at this time and they participated in the closing of the valve and were satisfied that the valve was properly closed (App. pp. 273a, 364a, 372a, 373a).

Matthews, the Lion tankerman who was on duty during the unloading operation, testified that during the process of the unloading operation he made a check of all valves on the barge and found the same to be operating properly. He also stated that as a part of his duties he looked into the kerosene compartments while the gasoline was being pumped off and that he did not notice any discrepancy. Matthews also checked the starboard valve when the list was discovered and he stated at this time that the valve appeared to him to be working properly and was tightly closed (App. pp. 199a, 200a, 201a).

Before pumping operations were resumed, Mr. Bull, on behalf of the Petitioner, insisted that samples be taken from the other compartments of the 966 to determine whether or not any mixture or contamination had occurred with respect to them. Samples from each were taken and it was determined that no gasoline had gotten

into either the kerosene or diesel compartments. However, some kerosene had been pumped into the shore tank containing ethyl gasoline along with the ethyl gasoline from compartments 1 and 2 of barge 966. After test and samples had been made, Bull was informed by the Lion dock employees that there was not sufficient contamination to affect or downgrade the product to any material extent. Following a delay of some three or four hours, the pumping operations were resumed under the orders and directions of the Lion personnel (App. pp. 29a, 30a, 146a, 275a, 276a, 277a, 278a).

The contamination or mixture of kerosene with the ethyl gasoline herein occurred after the delivery of same to the Respondent's dock at Memphis, Tennessee, and during the transfer of these products into Lion's shore tanks by the agents, servants, or employees of the Lion Company (App. pp. 30a, 335a, 337a).

The pumping operations continued without incident to completion of the unloading at or about 5:30 A. M. on the morning of April 27, 1957. Barges 965 and 966 with the tug Bull Durham departed the Lion dock about 5:45 A. M. that morning to return to Helena, Arkansas, Terminal. Barges 965 and 966 next proceeded to carry petroleum products for the Lion Oil Company from Helena to Chicago, Illinois, during which operation the loading and unloading were uneventful and no difficulty was found with the No. 5 starboard valve on Barge 966 (App. pp. 31a, 277a, 278a, 323a).

Upon completion of the Chicago trip, Barge 966 was taken to the Petitioner's dock at its headquarters in Joliet, Illinois. Following its arrival, Mr. Art Warren, port engineer for Petitioner company, under instructions from Mr. Ed. Bull, its president, made an inspection of the No. 5 starboard valve of said barge. In doing this the valve and valve stem were removed and there was

revealed therein a cotton cord of the type used by petroleum inspectors tied to the neck of a broken sample bottle and a hex nut. The cord which was approximately 15 feet long had become entwined around and in the threads of the valve (App. pp. 31a, 278a-280a, 378a-382a).

This was an internal type valve and the cord could not be seen by visual inspection either from the hatch on the deck or by examination from within the compartment (App. pp. 31a, 383a).

The cord was removed from the valve threads and the valve was replaced without any repairs being required. Prior to removal of the cord, it could not be determined by turning the valve wheel whether there was a cord or other foreign matter therein. There were no repairs of any kind made to the valve (App. pp. 31a, 383a-386a).

The type cord and the attached neck of the broken bottle and the hex nut were of the same type used by those who sample petroleum products on barges. Such gear during the time in question was not used by the crew members of the Petitioner towing company. The cord and its attachment were kept in the Petitioner's office at Joliet, Illinois, for approximately a year, but were later displaced or lost (App. pp. 31a, 383a-386a).

Following the unloading of all the products in the barges, the Lion Company had further tests made of the quality of the gasoline in the No. 6 shore tank and at that time determined that such gasoline would not meet the required specifications of 99 Octane ethyl gasoline and therefore had to be disposed of as a lower grade gasoline. This gasoline was sold to the Triangle Refineries at Houston, Texas, at a loss to the Lion Oil Company (App. pp. 31a, 57a). The trial court found that upon sale of the contaminated product, the Lion Oil Company suffered a net loss of $19,160.01 (App. p. 33a). The Court of Appeals affirmed the decision of the District Court.

ARGUMENT.

The Barge Was Not Unseaworthy.

Prior to loading the petroleum products on board the barge, the Respondent's agents, the inspectors of the Project Five Pipe Line Corporation, made an inspection of all cargo tanks and found them empty and in good condition to receive the various petroleum products. During and upon completion of loading the barge in question, all valves were checked by the agents of the Respondent and found to be operating properly (App. pp. 24a, 25a, 223a-229a and 317a).

After loading, Respondent's agents took samples from each compartment by lowering a bottle or can attached to a cord into each compartment and taking a small quantity of product therefrom. These samples were tested and no mixture or contamination of gasoline with kerosene or kerosene with gasoline was detected (App. pp. 26a, 223a).

The valves on the barge in question were working properly at the time of loading and the valves were completely closed upon loading; otherwise, there would have been contamination of product. The proof is undispited that there was no contamination or mixture during or after loading (App. pp. 221a, 226a).

The Respondent's personnel at Memphis, upon arrival of the barge, again made a check of the valves and the contents of the compartments. The Respondent's witness further testified that the No. 5 valve on the barge was in good order prior to commencement of discharge of product (App. pp. 27a, 28a, 114a, 115a, 164a, 166a).

Prior to removal of the cord from the No. 5 starboard valve, it could not be determined by turning the valve wheel whether there was a cord therein. The type of cord

and the hex nut were of the same type used by those who sample petroleum products on barges. The crew members of the Petitioner did not use such equipment (App. p. 32a).

The Trial Court found that the loading and unloading were under the control of the Respondent and that there was no disclosure of any actionable negligence on the part of the Petitioner which proximately caused the contamination or mixture of the ethyl gasoline with the kerosene. The Respondent as found by the Trial Court was responsible for the closing of the valves on the barge.

Under the doctrine of seaworthiness, all that is required of any ship owner is that he furnish a vessel and appurtenances reasonably fit for their intended use.

Mitchell v. Trawler Racer, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926.

In the Mitchell case, supra, the Court stated:

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. **Boudoin v. Lykes Bros. S. S. Co.**, 348 U. S. 336, 99 L. ed. 354, 75 S. Ct. 382."

The Petitioner in the circumstances of this case was a bailee under a private contract of carriage and as such did not assume the obligations of a common carrier. It was not an insurer. In a case of this type, the burden of proving a breach of duty or obligation rests upon the Respondent. **Commercial Molasses Corp. v. New York Tank Barge Corp.**, 314 U. S. 104.

A Vessel Is Not Unseaworthy as a Matter of Law Where Loss Is Caused Not by the Vessel, Its Appurtenances or Its Crew, But by the Isolated and Completely Unforeseeable Introduction of a Foreign Object From Without.

It is submitted that the Respondent did not prove that the Petitioner breached its duty to furnish a seaworthy vessel at the commencement of the voyage. There is no finding or conclusion by either the Trial Court of the Court of Appeals in its opinion that the barge was unseaworthy at the time the barge was tendered for loading. The warranty of seaworthiness applied only at the beginning of a voyage. This is the rule which has been established by the Supreme Court of the United States and followed in subsequent cases.

It is respectfully submitted that the Court of Appeals by its opinion in this case holds in substance that, although there was no finding the barge was unseaworthy at commencement of the voyage, it nevertheless became unseaworthy due to the fact that a valve was open during the time the same was being unloaded by the Respondent.

In **Morales v. Galveston**, 370 U. S. 165, 8 L. ed. 2d 412, 82 S. Ct. 1226 (1962), longshoremen were engaged in "trimming" wheat as it was being loaded in the hole of a vessel. A last "shot" of grain was called for and was released into the hole of the vessel. This grain had been treated with a chemical insecticide and the longshoremen were injured by fumes from the chemical, made noxious by concentration in the closely confined area where they were working. The longshoremen's claim was predicated upon the negligence of the shipowner and upon the unseaworthiness of the ship. The District Court entered judgment in favor of the grain elevator operator and the shipowner and found that there was no negligence and that the vessel was not unseaworthy

although it lacked a forced ventilation system. The Court of Appeals affirmed and the Supreme Court likewise affirmed the decision of the lower court and held that a vessel is not unseaworthy as a matter of law where injury is caused not by the ship, its appurtenances, or its crew, but by the isolated and completely unforeseeable introduction of a noxious agent from without.

The facts in the instant case are analogous to those in the Morales case, supra. The lower Court found that the loading and unloading operations were under the control of the Respondent, its servants, agents or employees and there was no disclosure of any actionable negligence on the part of Petitioner which proximately caused the contamination or mixture of the ethyl gasoline with kerosene. The lower Court did not find that the valve in question was defective but that the valve was not closed properly. The proof is very clear that the Petitioner or its crew did not exercise any control over the closing of the particular valve. The Respondent as found by the Trial Court was responsible for the closing of the valve. The only thing which might have prevented the valve from closing was the introduction from without of a portion of a string, bottle top and hex nut into this compartment. Even with the string entwined around the threads of this valve, the valve could be closed and was in fact properly closed after this condition was discovered.

It is strongly urged by Petitioner that the introduction of the string was an unexpected and isolated occurrence over which the Petitioner had no control and the same could not be detected by inspection.

The valve in question did not require any repair and no repairs were made to the valve.

It is submitted that the reasoning applied by Justice Stewart in the Morales case, supra, would equally be

proper in this case. Justice Stewart, in speaking for the Supreme Court, stated:

> "What caused injury in the present case, however, was not the ship, its appurtenances or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without."

It is therefore respectfully urged that the Court erred in holding that the barge NBC 966 was unseaworthy.

The question of unseaworthiness is reviewable on appeal for that upon the ascertainment of the facts, the deduction of unseaworthiness is a conclusion of law, reviewable as such.

Van Corpicas v. S. S. Harvester, 297 F. (2) 9 (2nd Cir., 1961);

Krey v. United States, 123 F. (2) 1008 (2nd Cir., 1941).

The Court of Appeals in Its Opinion Erroneously Concluded That the Market Value of the Ethyl Gasoline Was Proven.

The only attempt by the respondent to establish the market value of its product in the resulting alleged loss was by the witness, Robert Garrison. This witness clearly stated that his knowledge of the market value of ethyl gasoline in the Memphis area was from the Lion Oil Company records (App. p. 80a). The witness Garrison was not employed by the respondent at the time the records were prepared. The court allowed the testimony of this witness by use of company records in order to refresh his recollection. It is respectfully submitted that it would be highly improper to allow these records to be used to refresh his recollection when, in fact, he did not have an independent knowledge of the market value of the gasoline in the Memphis area at the time of the alleged loss.

In this instance the Trial Court and the Court of Appeals has approved the use of evidence which is tendered by a witness who has no independent knowledge of value, but who is allowed to testify as an expert on value by reference to records made by others to refresh a recollection which, independently of the records, the witness does not have.

In this regard it has been and is clearly the law that the witness' opinion must be his own; he cannot act as a mere conduit for the opinions of others. Thus the opinion as to market value is incompetent where the witness has no general knowledge of his own, but is merely transmitting information received from others. **Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County**, 123 Fed. 2d 286.

CONCLUSION.

Wherefore, upon the foregoing grounds, it is respectfully urged that the Petition for Writ of Certiorari should be granted.

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